Capital Case
No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Pursuant to Supreme Court Rules 21, 28.4, and 28.7, Respondent Patrick Dwayne Murphy and Amicus Curiae Muscogee (Creek) Nation ("Nation" or "Creek Nation") respectfully move that the Creek Nation be granted leave to participate in oral argument as amicus curiae supporting Respondent and that the Nation be allowed 10 minutes of argument time. The Nation has submitted an amicus brief in support of Respondent and seeks to present oral argument, as it did in the court of appeals, on an issue of paramount importance to it – the continued existence of the Nation's Reservation. Respondent has agreed to cede 10 minutes of argument time

to the Nation. Accordingly, no enlargement of the time allotted for this case would be required.

1. As it comes to the Court, this case presents a single question: whether Congress has disestablished the Creek Nation's treaty-guaranteed Reservation. Pet. Br. i; Resp. Br. i, 57-59. The court of appeals concluded that Congress has never done so – and thus that Respondent, a citizen of the Nation, should have been prosecuted by the United States rather than Oklahoma for his crime of murdering another Nation citizen within the Reservation boundaries. Pet. App. 7a-8a; *see* 18 U.S.C. §§ 1151, 1153(a) (providing for exclusive jurisdiction in the United States for the prosecution of murder when committed by an Indian within Indian country, defined to include reservations).

2. The status of the Creek Reservation is of critical importance to the Creek Nation for reasons going well beyond this case.

3. The Nation is the fourth most populous Indian nation in the United States. Tens of thousands of Creek citizens reside throughout the Reservation, which has been the Nation's homeland for nearly 200 years. Creek Nation departments and agencies deliver critical governmental services – including law enforcement, health care, education, prenatal and infant care, transportation, and family violence prevention – throughout the Reservation to both Indians and non-Indians. In doing so, the Nation has entered into dozens of cooperative agreements with state, county, and municipal governments in order to facilitate the provision of services to underserved communities, and the quality and importance of its efforts are routinely

recognized by its governmental counterparts. The Nation's governmental presence throughout the Reservation is an important predicate of those agreements, and key to the services that it provides.

4. In this Court, Petitioner mounts an all-out assault on the Nation's Reservation and in doing so attempts to rewrite the Nation's history. Where treaties between the United States and the Creek Nation set apart lands in the Indian Territory for the Nation and defined their boundaries in the classic manner of establishing a reservation – and where subsequent treaties and statutes consistently referenced a Creek Reservation – Petitioner nevertheless claims that the Nation did not enjoy a reservation there to begin with. Where Congress, pursuant to negotiated agreements with the Nation, allotted reservation lands amongst Creek citizens to fulfill the treaty purposes and expressly preserved the Nation's legislative authority over the Reservation, Petitioner nevertheless claims the treaties were abrogated and the Nation's jurisdiction abolished. Where Congress expressly continued the Creek Nation's existence and its governmental authority, the State would have this Court infer the opposite. And where Congress expressly provided that Statehood would not compromise the rights of Indians in their lands, the State would again have this Court disregard Congress's words and deem the boundaries of the Creek Reservation "evaporated." Pet. Br. 27.

5. The Nation is uniquely positioned to address these arguments. Each of Petitioner's claims contradicts the text and underlying history of treaties and other agreements negotiated by the Nation and the United States, and of statutes enacted

by Congress concerning the Creek. The Nation has an intimate familiarity with these foundational authorities and their history – a familiarity forged in the crucible of constant battle first to survive and then to flourish anew as a government – and has a strong sovereign interest in countering Petitioner's atextual and ahistorical narrative with its own informed understanding.

6. The Nation is likewise uniquely positioned to address Petitioner's claim that an affirmance will render Oklahoma a "second-class State." Pet. for Cert. 34. As noted, and Petitioner's litigation rhetoric aside, the Nation works in close cooperation with State, county, and municipal governments to provide effective governmental services throughout the Reservation, including in rural areas that would be drastically underserved were it not for the Nation's efforts. The working relationships with neighboring governments are often reflected in cooperative agreements, and a shared understanding that the Nation enjoys a measure of governmental authority throughout its Reservation is an important predicate for that cooperation. The Nation has a strong sovereign interest in addressing Petitioner's efforts to undermine that understanding.

7. The Nation can also convey to the Court its understanding of the limitations (borne both of congressional enactments and this Court's decisions) that constrain its authority over non-Indians on fee lands within the Reservation, limitations that expose as hyperbole the claims of Petitioner and his amici regarding the consequences that will follow from an affirmance. The Nation has operated for many years within the framework established by Congress and this Court to provide

effective governmental services to its citizens and non-citizens within the Reservation, and again has a strong sovereign interest in addressing these issues should they arise at argument.

8. In sum, the Creek Nation has an unusually direct and significant interest in the resolution of this case and is uniquely positioned to address issues raised by the question presented.

9. The importance of the Creek Nation's participation in this litigation, including at oral argument, was recognized in the proceedings below. The court of appeals granted the Nation's motion for expanded briefing limits and allowed it to present ten minutes of oral argument in addition to Mr. Murphy's allotted time. *See* Doc. No. 01019666915 (Aug. 3, 2016); Doc. No. 01019765949 (Feb. 15, 2017). The State also viewed the Nation's perspective as central, requesting and receiving expanded briefing limits and time expressly to respond to the Nation's amicus brief. *See* Doc. No. 01019691522 (Sept. 20, 2016); Doc. No. 01019699241 (Oct. 3, 2016). The court of appeals' decision likewise reflects the significance of the Nation's participation, as the Court extensively analyzed historical materials and arguments presented by the Nation in arriving at its decision. Pet. App. 105a, 114a-132a.

10. The United States has filed a brief as amicus curiae in support of Petitioner and has sought leave to participate in oral argument and to divide time with Petitioner's counsel. If this Court follows its usual practice and allows the United States to argue in support of Petitioner, that would provide an additional, compelling reason to hear from the Creek Nation. The United States and the Nation

are the two signatories to the key treaties at issue here, and likewise engaged in the intensive negotiations culminating in the Creek Allotment Act of 1901, ch. 676, 31 Stat. 861. If the United States is to present its understanding of those agreements at argument, fairness requires that the Nation should be allowed to do the same. Respondent and the Nation respectfully submit that granting divided argument on both sides, and thus allowing all three directly interested sovereign governments to participate, will best ensure a full presentation of issues going to the very heart of the Nation's history, identity, and continuing governmental authority.

Respectfully submitted,

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